COLUMBIA LAW REVIEW.

VOL. XII. NOVEMBER, 1912. No. 7

THE GENIUS OF THE COMMON LAW.[1]

V. RESCUE AND RANSOM.

HAVING now seen something of the troubles that beset our lady and her servants at sundry stages of their pilgrimage, we may well be curious about the remedies: and here we must deal tenderly with lay common sense, which may be apt to think that we are making a great fuss and mystery about nothing to magnify the importance of our faculty. The plain man is ready enough to believe that the Common Law has had outworn and cumbrous tools to work with. What he does not so readily see is why we should not scrap our old plant like other modern men of business and say no more about it; or for that matter why it was not done centuries ago.—So simple a thing, he will say, for you lawyers to devise new and better forms; you have not even cost of materials to reckon with; nothing but pen and ink—yes, and brains, I know; but without brains no business of any kind gets done. Did King Henry II sit up o'nights over the Assize of Novel Disseisin, whatever that may have been? Well, I suppose that was what he was king for.—My dear man, answers our lady the Common Law, I have to tell you that it was just you lay people, as often as not, who hindered my servants from improving things in the simplest way when they were eager to do it and drove them into making their improvements by crooked devices, to the great disparagement of my honour and worship, and useless charges and vexation of my suitors.—Will the worthy layman believe that? Our time is full short to convince him if he does not already know

[1] *Errata.*
Vol. XII p. 190, note 1: "STON-NAUGH" should be "STON. Nanyl."
Vol. XII p. 292, line 35: "formation" should be "formalism."

the facts. We can only give him a few of them in the time we have.

One fact is that in the thirteenth century the king's judges and clerks were ready to provide new forms of writs to meet the growing demand for the king's justice. That was the rational and straightforward course. It was no fault of theirs that their beneficent invention was checked by jealousy, the jealousy not of any professional vested interest but of outside interests and privileges. Many great lords, many smaller ones too, had their private jurisdictions or judicial franchises[2] and derived much profit from them in fees and fines. If the king's justice had a free hand, their privilege and profit would be assailed by novel and irresistible methods of competition. I cannot affirm that their jealousy was reënforced by the ancient popular distrust of official experts and the superstitious popular sentiment which, except under pressure of an immediate grievance, looks on innovation of any kind with fear and dislike; but I cannot think it improbable. In any case the skilled reformers were not allowed to carry out their intention. The profession and the suitors were put off with the half-hearted recognition of Actions on the Case, which amounted, in untechnical language, to saying that new remedies might not be introduced except under pretense of being variations on old ones. Whether the lords of private courts were any the better for this may be doubted. They did not know that our lady the Common Law was to have much of King Edward I's heart in her governance, and had Quo Warranto up her sleeve for him that therewith he might teach arrogant lords their place. But that story is not for us here. Again, skipping some centuries, we may ask the judicious critic to note that no less a publicist than Junius denounced Lord Mansfield's reforms, universally approved by later generations, as arbitrary corruptions of the law and encroachments on the liberties of Englishmen, substituting his own unsettled notions of equity for positive rules. In one sense, indeed, it is true enough that you can hardly expect reform if you are not prepared to interfere with liberties: namely, if you take the word "liberty" in the sense it regularly bears in medieval Latin, which is a right, by way of monopoly, custom or otherwise as it may be, to get all you can out of somebody. This may seem less paradoxical when we remember that "franchise" is only the French equivalent of *libertas*.

[2]The profits of justice which was originally public or royal could be appropriated in various ways, and not seldom were.

Intelligent laymen, to be sure, have tried their hand at contributing to law reform, but they have not been invariably successful even in our enlightened age. A certain well meant amateur addition to one of our English Companies Acts was fruitful of litigation and costs until, a few years ago, it perished unlamented in the general revision of a consolidating act. Another recent example is perhaps more instructive. In the latter years of the nineteenth century, notwithstanding the reconstruction of our judicial system in 1875 and the merger of all special jurisdictions in the universal powers of the High Court, there was much complaint among London business men of delay in hearing commercial causes in the Queen's Bench Division. An elaborate scheme for a voluntary tribunal of arbitration was framed by a combination of legal and mercantile wits, and the names of many distinguished lawyers were placed on the rota of arbitrators. It was a mighty pretty scheme, but its promise was cut short in an unexpected manner. Lord Gorell (then Justice Gorell Barnes of the Probate and Admiralty Division) gave out one day[3] that he was ready to put causes of a commercial kind in a special list, expedite all interlocutory stages, and abridge or wholly dispense with pleadings, if the parties would only undertake not to raise merely technical points and to admit all substantially uncontested facts. He also gave a hint that (the actual jurisdiction being undoubted under the Judicature Act) it would not be the Court that would ask whether any particular cause were exactly an Admiralty matter. This pioneer experiment was speedily followed by the common-law judges,[4] who established the so-called Commercial Court by a simple exercise of administrative discretion.[5] It is in truth not a distinct court, but a special cause list open to parties on the understanding devised in the first instance by Justice Gorell Barnes, and assigned to a judge familiar with commercial matters. The arrangement works excellently and nothing more is heard of the grand arbitration scheme which was to relieve the congested courts and display the superior resources of private enterprise.[6] Of all this the general public knows nothing and some lawyers very little;

[3] In 1893; see 9 Law Q. Rev. 373.

[4] This, though no longer officially correct since 1875, is still a current and convenient term in the profession.

[5] In 1895, see Encycl. Laws of England, *s. v.* "Commercial Court."

[6] We shall not forget that there was and is a great deal of private and quite informal arbitration nor think it any reproach to the law that this, whenever practicable, is a better way than litigation.

for it was done with no controversy and an absolute minimum of formality. Sure I am that for so complete and peaceful a triumph of rational procedure Lord Gorell and his companions have earned our lady's most benignant smile. It remains true that lawyers tend, for the more part, to cling to the tradition, good or bad, ancient or recent, in which they were trained. But when reforms have been carried against the majority of the profession, I think it has always been by the exertions of a keen and able professional minority who cared much more about their cause than the public whom they persuaded to support them.

These preliminary remarks make no claim to be exhaustive or systematic. It is enough to have shown that correction of the evils due to formalism and stagnation is not such an easy matter as it looks and that the blame of failure, when it occurs, is not always due to the lawyers. We will now try to classify the remedial methods: they are all more or less artificial, and sometimes they involve an element of pious fraud, or rather (for it has a better sound in Latin) *dolus bonus*. The most ancient way is to call in aid authorities and jurisdictions which in their origin were extraordinary, and which just for that reason still have some discretionary freedom. The next is to extend and develop the more convenient modes of procedure at the expense of the less convenient; and here we find the uses of fiction, that sadly misunderstood instrument of justice. The third method, effective if employed with due skill and knowledge, is the specific amendment of what is amiss by some form of legislative authority. A fourth and very modern way is the systematic reconstruction of procedure as a whole, a dispensation under which many of us are now living. In this, as likewise in partial improvement by legislation, the power employed may be either direct or delegated.

First, then, the use of extraordinary jurisdiction to circumvent the defects of ordinary forms is the royal road in every sense for so long as it is practicable. By that method the superior courts as we knew them from the thirteenth to the nineteenth century, were established. The doctrine of the twelfth century under Henry II, is that the hundred and county courts are still the instruments of ordinary justice. There is a list of criminal matters reserved for the king, as a certain number were even before the Norman Conquest; in civil matters the king as overlord has original jurisdiction over his own immediate tenants, and to a considerable extent he can supersede the county court in

other cases. A great mass of minor business is left to the popular courts, or to the seignorial and other special jurisdictions which are actively competing with them. Still the king's justice is fast growing in importance and it is thought proper that an officer of its inner circle should write a manual of its practice under the Justiciar's patronage. About a century later we find that the king's court has definitely come to the front, and a body of learned persons permanently attached to it as judges, clerks and practitioners is already formed. There are still pretty large gaps in the jurisdiction but the judges are eager to fill them. If their efforts are not wholly successful, it is not from the profession, as we have already noticed, that the difficulties come. In one region, indeed, that of contract, law and procedure are rudimentary, and have to remain so for about two centuries more. Here, however, we must remember that the materials, in the actual state of business among Englishmen, are rudimentary likewise, outside the sphere of the law merchant, and external trade is for the most part in the hands of foreigners who settle their affairs within their own gilds or in the market courts. The hundred court is moribund and the county court is kept alive in strict subordination to the king's judges, it would seem chiefly for the purpose of collecting the king's fines. But there is already a less favourable side to the picture. One cannot have an elaborate and far-reaching official system for nothing. In becoming highly organized the king's justice has become formalized, though not after the archaic fashion. No room is left for patriarchal intervention like the Conqueror's or even Henry II's. Forms of action are inflexible, precedents are binding, judges know and counsel are ready to remind them, that the judgments they make on any new question will be law for their companions and successors. Moreover the complaints of great men defying the law have not ceased. The hands of the king's judges are valiant in his work, but there is much left that only the king in his Council can do. Learned canonists and civilians are not wanting who boast of their summary procedure; and it is like enough that in some dioceses and archdeaconries people who are in the ale-house when they ought to be in church, or perjure themselves, or commit other scandalous actions, do find the process of the Court Christian more summary than they desire.

Accordingly, we have no cause for surprise when, after another century, we see the Chancellor's jurisdiction rising and becoming

popular. We may learn from Blackstone, who followed his Elizabethan authorities quite correctly, that it was founded in the king's unexhausted duty to see justice done where the ordinary means fell short or were frustrated. Equitable jurisdiction, coming so late on the scene, had to go through a stage of conflict with the older courts at Westminster and long remained a thing apart from the Common Law in the most specific sense of that term. It so remains in some jurisdictions even now. We may doubt whether the conflict that took place in the days of Elizabeth and James I was at all reasonably necessary; we may be sure that it was aggravated by Coke's pseudo-antiquarian pedantry and the personal hostility between him and Bacon. But at this day we can see that the growth of the Chancellor's equity, and the fixing of it in a model as regular as that of the common law (on which Blackstone again speaks profitably), were really a continuation of the very same historic process which began with Henry II's reforms and was witnessed and confirmed by the Great Charter. The development of auxiliary criminal jurisdiction in the Star Chamber was exactly parallel (as Bacon has told us) and did quite honest service for a century or more. It was ruined not by inherent vice but by abuse; the Star Chamber was doomed when Charles I made it an engine of political and ecclesiastical persecution. With it fell the whole method of invoking extraordinary jurisdiction to create new forms of justice which in due course become ordinary. Cut short by violent death before our civil war had begun, it must be pronounced extinct on this earth. We cannot tell whether long life or honourable euthanasia would have been its portion if the Stuart kings had been masters of a different kind of statecraft from that which they exhibited in fact. There may or may not be some innocent reason in the judicial nature of things why the art of drawing as required on the king's reserved treasures of justice must in any case have lost its virtue. I see no such reason myself. It rather pleases me to dream of some planet where a dynasty of wise rulers, escaping religious distractions and civil strife, established responsible government at a stage (let us say) corresponding to our politically barren fifteenth century; where judicial discretion doing its best to be impartial is not hampered at every turn by the meddling of partisan statutes with their crude remedies of contrary excess, first one way and then the other, for the grievances of successive generations; where nobody pretends to be infallible, and not honest mistake is cen-

sured, but obstinate refusal to acknowledge and repair it; where Orders in Council, carefully framed by the servants of the State with the best skill available and after all due consultation, and operative by an inherent authority which it has never been necessary to dispute, provide for most administrative needs; where commissions of inquiry are a serious and judicial preparation for action; where matters of principle are gravely and fruitfully discussed in an assembly whose considered opinion is the policy of the realm; and where formal legislation, other than for financial purposes, is rather an exceptional solemnity. I do not ask whether a party system either of the British or of the American type deserves a place in that dream; it is not a question of law, therefore, not fit to be considered here.

Secondly, there is some consolation in extending old jurisdictions, if you cannot make new ones. Here our lady the Common Law smiles a little at those who wonder that she favours economic competition and dislikes monopoly. "How should I not approve competition," she whispers to her more discreet apprentices, "when I owe so much of my resources to the competition of my servants for fees? All through the Middle Ages and even later jurisdiction meant fees and profits; or do you really think thirteenth-century lords (including bishops and mayors) took a sentimental pride in hanging their own thieves? My sister Canonica may purse up her mouth if she likes, as who should say that in her kingdom they know nothing of such vulgar motives. I am not denying her genuine zeal for the welfare of souls and we all know that breach of faith is a sin. Still, would bishops and archdeacons have entertained suits in the Court Christian about a load of hay or a loan of pots and pans if there had been no profit in it? And if my servants had not found that between the king's Chancellor and the bishop's chancellors they were in danger of losing much good business, how much longer might I have waited for a rational doctrine of contract? Sister Canonica puts on her most precise air and all but sniffs; I know she will not believe we have made it rational yet. Well, I profess to hold people to their bargains and not to hold them to promises that are not bargains unless they choose to make it a solemn affair. After all, is not that common sense? My sister holds out in one hand the profession of enforcing all serious promises and takes away most of it with the other by means of artificial exceptions and rules of proof. I like my own way better. As for having reached a

tolerably simple conclusion by devious and puzzling ways, we have both done too much of that to criticize one another." But we must respect our lady's confidences; perhaps we have already gone to the verge of prudence.

Just now that which directly interests us is not so much the competition for business between rival courts as the competition within our own house between different methods of procedure, old and new, permanent and experimental, of which the most convenient or at any rate the least inconvenient came out successful. At the same time this operation was an indispensable factor in actual extensions of the jurisdiction. The tool which had to be handled for all or almost all the work was the Action on the Case; and we shall find it curious to remark on how narrow a foundation the great superstructure of our classical common law was built. In a general way there was nothing to prevent an action analogous to any of the settled forms being framed "in a like case." But in fact the more ancient forms were too stubborn to be dealt with in this manner; not by reason of anything in the cause of action itself, but because they were entangled in cumbrous and awkward points of procedure at every stage. Here we may learn something from the little noticed mistake of a great author. Blackstone conjectured that the action of Assumpsit, the regular modern action of contract, was the action on the case answering to the thirteenth-century writ of Covenant: a clever but rash and baseless conjecture, and hardly excusable, for without going farther back than Coke's Reports he might have known that it was originally founded in tort. Now in fact there was nothing to be done in that way with Debt or Covenant, or even with Account, which at first sight might look more tractable. The only forms that would really serve were those of the later thirteenth century which had a specially royal and official character, and therefore were fairly free from archaic incidents, namely Trespass and Deceit. All our modern remedies in the Common Law so far as concerns ordinary civil affairs are the offspring of one or the other; Assumpsit, by a peculiar combination, of both. Trespass protected and still protects actual possession; its analogous extensions protect the right to possess, as distinct (not necessarily separated) from possession itself, in corporeal things, and also the many categories of exclusive right in incorporeal things. We are not to conceive this process as exhausted in the Middle Ages or at any assignable time; it would be rash, in my opinion erroneous, to say that it is

exhausted now. Not till after the Restoration was pleading on ordinary contracts and quasi-contracts immensely simplified by the bold and beneficent invention of the "common counts" for goods sold and delivered, money paid, and so forth. Fraud not involving a breach of contract was long regarded as a matter that only the Count of Chancery could deal with, until in the latter part of the eighteenth century the common law jurisdiction attacked it with the action on the case for deceit. Later still, not much more than half a century ago, came the action for procuring breach of contract, allowed against learned and weighty dissent, continued in the face of more dissent and severe criticism, in jeopardy, as it seemed, within quite recent memory, and finally confirmed in England, and set on its true footing, only by judgments in the House of Lords and the Court of Appeal so recent that they passed through my hands as editor of the Law Reports. American jurisprudence, to its credit, was more firmly progressive on this delicate point. In our most modern stage, be it noted, opposition comes not from without but from within. Our lady the Common Law has many stout men doing her knight service, and some of them are more adventurous than others. Her landmarks have not been advanced without hesitation and partial retreats. In some cases imprudent expeditions, or indeed unlawful raids on the freedom of lawful men, have been properly restrained. On the other hand there have been regrettable checks, and for us in England some irreparable ones. My learned friend Professor Williston of Harvard is not too late in this country to lift up his voice against the narrow and inelegant decision of the House of Lords in *Derry* v. *Peek*.[7] But it is becoming an old story, and I said long ago what I could say about that misfortune, as we of the Equity Bar thought it.

If the Action on the Case was the right hand of our lady's servants in extending her realm, the left hand was Fiction; or rather we should have to symbolize her as a Hindu goddess with many hands both right and left. By fiction the cumbrous real actions were all but laid on the shelf, and those two good stage carpenters John Doe and Richard Roe set a scene which they left clear for the speaking actors to play their parts without further hindrance.[8]

[7] "Liability for Honest Misrepresentation." By Samuel Williston. 28 Harv. L. Rev. 415.

[8] It might have been better to simplify and rationalize the principal real actions, as indeed several American states have done. But it would take us altogether too far, in our present short course, to stop for discussion of what might have been; and let this apology cover other like cases as they occur.

By fiction, the fiction of conclusively presuming that a man had promised to pay what he owed, Assumpsit annexed the territory which formalism would have reserved for Debt. By a new and most ingenious fiction, almost in our own time, Willes and his brethren gave us a complete remedy for the case of an agent who professes, whether in good or in bad faith, to have an authority which he has not. True it is that the fiction was called for only by reason of a stupid maxim due to some unknown medieval bungler who had dabbled in Romanist phrases. By fiction our lady the Common Law borrowed the name of a still more exalted lady, St. Mary-le-Bow in the ward of Cheap, to stretch the power of her arm beyond the four seas, as Governor Mostyn learnt to his cost. It is easy to laugh at these and other fictions that our fathers made in their need. Their outer garb may be quaint, even grotesque; but in every case there was a sound principle of justice under these trappings and the ends of justice could not be otherwise attained. Many were the suitors who invoked the aid of the king's Exchequer against persons alleged to be in their debt, and by default in payment to hinder them from paying their own dues to the king. No penny of those imaginary dues went into the royal accounts, but the writ of *Quo minus* turned the Exchequer from a mere revenue department into a court co-ordinate with the King's Bench and Common Pleas, and at last fully equal to them in strength and reputation. The King's Bench itself was not above laying hands on the pleas of subjects by a fiction even more transparent. Uniformity of Process Act, Common Law Procedure Acts, Judicature Acts, these in our fathers' time and our own took down the queer untidy scaffolding of procedural devices; but without the scaffolding the builders could not have worked.

The third remedial method is the most obvious and at first sight should be the most useful, namely, specific amendment by legislation directed to particular defects as they are discovered or come to be more urgently felt. Without doubt this is a serviceable instrument when rightly handled, but in unskilful hands it can be a remedy worse than the disease. Until our own time it was commonly treated as belonging to the technical part of the law and left to the leaders of the profession. It is much older than we commonly recognize. Much of the familiar everyday process in our courts of law rests on medieval statutes which not one modern lawyer in a hundred has ever looked at; all power to deal with costs, for example, is derived from statutes. The partial

reforms in pleading effected in the early part of the eighteenth century and commemorated, as we have already seen, by Blackstone, are almost as little remembered at this day. Many provisions of this kind have become obsolete and are superseded by better or more comprehensive enactments. It is probable that some were never anything but mistakes; for good lawyers may fall into bad mistakes of policy. Some, it is certain, were mere failures, proving inoperative in practice from one or another unforeseen cause. At best there are points of inherent weakness in these occasional repairs. Even a tinker of genius cannot get beyond tinkering, and tinkers are not men of genius as a rule. There is no security for any uniform plan being followed, or even for the workman of to-day having any clear understanding of what those before him have done. Indeed, it is often hard enough for experts, after a long course of statutory patching and mending, to know what the result amounts to, and how much of it was intended. Then the modern conditions of legislative discussion have brought in the danger of amateur meddling, and the not very desirable antidote of purposely framing technical amendments in the form least intelligible and most repulsive to the lay mind. Much has been said in reproach of lawyers, but there is more and worse to be said, if we chose to say it, against the man of business who thinks he knows better. The foregoing remarks are also more or less applicable to the mechanism of larger constructive changes in the substance of the law, which, however, is not immediately before us. On the whole, the genius of the Common Law works here in a turbid medium where "the gladsome light of jurisprudence" is apt to be sadly obscured. This is in some measure the fault of the profession itself. Both judges and practitioners have often lacked either the wit to know or the will to try how much could be done without legislation.

The fourth and latest way of amendment we have to note is deliberate reconstruction of jurisdiction and procedure on a large scale: a heroic method adopted in many countries outside the Common Law, but oftener than not for political or national rather than purely legal reasons. One may find it associated, as in the codes of continental Europe, with systematic recasting of the substantive law itself, but this has not been the usual way of the Common Law. One great drawback to extensive schemes of this kind has been the neglect to make any regular provision for future amendment; hence arises danger of the new model becoming

stereotyped and begetting new formalism of its own, which in time may be little better than the old. Periodical revision at fixed intervals has been often recommended but, so far as I know, seldom practised. In England we have found another way, less ambitious but not less effectual, by delegating a continuous regulating power to the Court. It is easier for our judges to supplement or amend the Rules of the Supreme Court (which are in substance a procedure code) than for the Government of India to revise its Procedure Codes even without the complication of the parliamentary machine and with the aid of an expert but overworked Legislative Department. In English-speaking countries all these things would be better done if professional zeal, when it is awakened, were backed by an intelligent public opinion. But we have allowed our art and mystery[9] to become a mystery, in the sense of the like-sounding and now more familiar word, to the lay people; and in this and other ways we have to pay for it. The best of all would be, once more, that the Courts should never be wanting in the knowledge of their own inherent powers and the courage to use them. But this achievement is of a felicity not reducible to classification or rule.

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[9] *Ministerium* (mod. French métier) not *mysterium*.